SOME ASPECTS OF THE UNION'S DUTY OF FAIR REPRESENTATION

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I. THE SOURCE OF THE UNION'S DUTY OF FAIR REPRESENTATION

The union's duty of fair representation arises out of the collective bargaining relationship. It concerns the manner in which the union deals with the employer on behalf of those employees for whom the union is the bargaining agent. For analytical purposes, fair representation in collective bargaining can thus be distinguished from equitable treatment by the union of its members or of applicants for membership, although it is obvious that instances of hostile discrimination in both collective bargaining and the conduct of internal union affairs frequently have a common origin.

The nature of the union's duty of fair representation, which has been the subject of so much scholarly investigation and analysis in recent years, did not formerly assume such importance. So long as unions bargained only for their own members, charges of unfair representation were seldom brought to the attention of the public, and only a few students of the then esoteric subject of internal union government paid much attention to them. Courts, too, were generally disinclined to interfere in matters which they regarded as essentially private disputes between unincorporated voluntary associations and their members.[1]

This state of affairs was fundamentally and irreversibly changed, however, by the enactment in 1935 of the National Labor Relations Act (NLRA), which provided, among other things, that collective bargaining representatives designated or selected by the *majority* of employees in an appropriate bargaining unit were to be the exclusive representatives of *all* the employees in such unit.[2] Employers thereby became subject to the affirmative duty to bargain collectively with the majority union, as well as to the negative duty to refrain from bargaining with representatives of minority unions;[3] nor could they evade these obligations by negotiating employment contracts with individual employees.[4]

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1 The reasons for this reluctance are explained in Chafee, "The Internal Affairs of Associations Not for Profit," 43 Harv. L. Rev. 993 (1930).

2 National Labor Relations Act (Wagner Act) § 9(a), 49 Stat. 453 (1935), 29 U.S.C. § 159(a) (1958).

3 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

4 J. I. Case Co. v. NLRB, 321 U.S. 332 (1944).

Under the new arrangement, therefore, large numbers of workers came to be represented in collective bargaining by unions which they had not chosen and, possibly, did not wish to support. Although the exclusive bargaining authority vested in unions was theoretically balanced by a corresponding duty to represent all employees in the appropriate unit fairly, and to refrain from hostile discrimination against any of them,[5] the authority turned out to be far more easily enforceable than the duty. This was true partly because the whole thrust of the Wagner Act's enforcement machinery was directed at employers, whose resistance to unionism in the thirties presented the chief obstacle to effectuation of the national labor policy, and partly because the more common types of unfair discrimination by unions in their representation of nonmembers or of dissident members were usually covert and difficult to prove. If an employer tried to undermine the majority union's status by making private agreements with individual employees[6] or by bargaining with a minority union,[7] he could readily be compelled to cease and desist from continuing such activities. If, on the other hand, a union informally adopted the policy of never protesting a breach by management of the seniority provisions of the collective agreement when the violation favored a union member against a nonmember, and of always protesting in a reverse situation, the likelihood that the National Labor Relations Board (NLRB) or the National Railroad Adjustment Board would take notice of the practice or do anything about it was extremely remote.

Even some of the more flagrant discriminatory practices of unions against employees whom they were obligated to represent seemed to be relatively immune to remedial action by administrative agencies or the courts. Chief among such practices, of course, was the refusal to admit Negroes or members of other minority groups into membership on the same basis as all other members,[8] and the companion practice, especially of the railroads, of negotiating with employers collective agreements containing provisions that discriminated against Negroes.[9] A less publicized but equally bald form of discrimination against all nonunion members in the bargaining unit was that accomplished by means of a system of "joint wage review," which prevailed for a time in parts of the Southern California aircraft industry. Under that sys-

[5] See Wallace Corp. v. NLRB, 323 U.S. 248 (1944); *cf.* Steele v. Louisville & N. R.R., 323 U.S. 192 (1944).

[6] National Licorice Co. v. NLRB, 309 U.S. 350 (1940).

[7] Hughes Tool Co. v. NLRB, 147 F.2d 69 (5th Cir. 1945).

[8] Northrup, Organized Labor and the Negro (1944); Summers, "Admission Policies of Labor Unions," 61 Q.J. Econ. 66 (1946).

[9] See Steele v. Louisville & N. R.R., *supra* note 5.

tem periodic merit increases could be awarded only by majority vote of a review board composed of equal numbers of employer and union representatives. Merit increases to nonunion employees were frequently vetoed by the union representatives on the board, the laconic explanation "for the record" being that they were "uncooperative." Significantly, it was the National War Labor Board (NWLB), exercising special wartime powers, rather than the NLRB, that put a stop to this discriminatory practice.[10]

Under the Wagner Act, the closed shop was expressly declared to be legal.[11] Throughout the period of World War II, however, the type of union-security provision covering most workers was the maintenance-of-membership clause devised by the NWLB.[12] This provision preserved the right of employees to refuse to join the certified or recognized union, and also allowed a fifteen-day "escape period" at the expiration of the collective agreement, during which union members could resign with impunity. Those workers who voluntarily joined and remained in the union, however, were obligated to maintain their membership in good standing as a condition of continued employment for the life of the agreement.

With the passage in 1947 of the Labor Management Relations Act,[13] this era of voluntarism came to an end. The amended NLRA outlawed the closed shop, but expressly authorized a form of union shop that imposed substantially greater compulsions on employees in the bargaining unit than the maintenance-of-membership provisions had required. Under a lawfully executed union-shop agreement employees in the covered unit were compelled to join the union no later than thirty days after being hired or after the effective date of the agreement, whichever came later, as a condition of continued employment. This requirement was not binding, however, if the employee was not offered membership "on the same terms and conditions generally applicable to other members." Moreover, no employee was required to "join" the union in the sense of "taking the obligation"; he was simply required to "tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership."[14]

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10 See Consolidated Vultee Aircraft Corp. (Tucson, Ariz.) and International Ass'n of Machinists, 16 War Lab. Rep. 159 (1944).

11 Section 8(3), 49 Stat. 452 (1935), 29 U.S.C. § 158 (1958).

12 For a history of the development of this formula, see 1 NWLB Termination Rep. ch. 7 (1946).

13 61 Stat. 136 (1947), 29 U.S.C. §§ 141-44, 151-68 (1958), commonly known as the Taft-Hartley Act.

14 Section 8(a)(3), 61 Stat. 140 (1947), as amended, 61 Stat. 601 (1951), 29 U.S.C. § 158(a)(3) (1958). As originally enacted, § 8(a)(3) also required that the union must

In 1951 the Railway Labor Act was amended to legalize, for the first time under that statute, union-security provisions substantially similar to those authorized by the amended NLRA, but differing in several material respects.[15] The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) again amended the NLRA provisions with respect to union security by permitting employers "engaged primarily in the building and construction industry" to enter into union-shop prehire agreements with unassisted building-trades unions, without regard to their majority status. Under such agreements, employees must, as a condition of their employment, join the union within seven days following the date of hire or the effective date of the agreement, whichever is later. The other restrictions, described above, are still applicable.[16]

Since 1947 the union shop has become by far the most common type of union-security provision.[17] Fairly administered, it represents a reasonable compromise between those who resent being forced to submit to the discipline of an organization whose views they disagree with and do not wish to support, and those who are equally incensed over the idea of letting the so-called "free riders" share the benefits of union activity without contributing financially to its assistance. Whenever a union abuses the powers that it derives from its status as exclusive bargaining representative, however, the added obligations enforced by a union-shop provision become that much more onerous for those who are the objects of the union's unfair treatment, or who oppose a particular union or unionism in general. In this sense only does "compulsory unionism" become a distinguishable element in the broader analysis of the union's duty of fair representation.

II. Some Illustrative Problems

The obvious cases of unfair treatment of employees by the exclusive bargaining agent, as well as the various legal and equitable remedies available to those employees who have been wronged, have

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first have been authorized to negotiate such an agreement by a majority of employees in the bargaining unit eligible to vote; but that clause was subsequently repealed.

15 Section 2, Eleventh, 64 Stat. 1238 (1951), 45 U.S.C. § 152 (1958). The most significant differences between the union-security provisions of the two statutes are the inclusion of assessments (but not fines and penalties) in the permissible charges, and a period of sixty (rather than thirty) days in which to join the union, under the Railway Labor Act.

16 Section 705, 73 Stat. 545 (1959), 29 U.S.C. § 158 (Supp. I, 1959), adding § 8(f) to the National Labor Relations Act.

17 See Theodore, "Union Security Provisions in Major Union Contracts, 1958-59," 82 Monthly Lab. Rev. 1348 (1959).

been exhaustively considered by a number of authorities in this field.[18] The most difficult problems, however, are those which raise the question whether there has in fact been a breach of the duty of fair representation. To what extent must individual demands yield to the will of the majority? Are there some individual rights that must remain immune to any sort of restriction, no matter how much they clash with the union's institutional objectives? When, if ever, are the employer and the union justified in overriding the wishes of an individual employee, or perhaps of a majority of employees, in the interest of preserving and enhancing the collective bargaining relationship?

In this article we shall consider a few examples of the many cases raising such questions in three general types of situations: (1) the negotiation of the collective bargaining agreement; (2) the administration of the agreement, specifically through the grievance and arbitration procedure; and (3) the use by the union of members' dues and initiation fees, obtained by virtue of a union-shop clause in the agreement, for purposes not directly related to the subjects covered by the agreement.

A. Negotiating the Terms of a Collective Bargaining Agreement

Most authorities have distinguished rather sharply between the nature of the union's duty of fair representation in negotiating a collective agreement and the nature of that duty in handling grievances arising out of the agreement once it has been negotiated. The reasons why the union should be given a wider latitude of discretion in negotiating an agreement were explicitly set forth by the United States Supreme Court in *Ford Motor Co. v. Huffman*.[19] That decision upheld the propriety of a negotiated change in a seniority provision granting credit for military service prior to employment under the agreement, although the result was to give some new employees more seniority than others with longer service in the bargaining unit. In its unanimous opinion the Court flatly declared that the bargaining representative "is responsible to, and owes complete loyalty to, the interests of all whom it represents."[20] Since the interests of all employees are

[18] See, for example, Aaron & Komaroff, "Statutory Regulation of Internal Union Affairs," 44 Ill. L. Rev. 425, 631 (1949); Blumrosen, "Group Interests in Labor Law," 13 Rutgers L. Rev. 432 (1959); Blumrosen, "Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy," 13 Rutgers L. Rev. 631 (1959); Cox, "Rights Under a Labor Agreement," 69 Harv. L. Rev. 601 (1956); Cox "The Duty of Fair Representation," 2 Vill. L. Rev. 151 (1957); Summers, "Individual Rights in Collective Agreements—A Preliminary Analysis," N.Y.U. 12th Annual Conference on Labor 63 (1959).

[19] 345 U.S. 330 (1953).

[20] *Id.* at 338.

not the same and, indeed, are often sharply in conflict, the Court's uncompromising statement, standing alone, placed the union in the rather sticky logical difficulty of maintaining complete loyalty to a number of competing interests. Fortunately, the Court recognized this problem, at least tacitly, by continuing in a somewhat more reasonable vein:

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.[21]

Adverting to the same problem facing a union when it negotiates a collective agreement, Professor Summers has emphasized that the final settlement comprises "a single package of assorted benefits which are neither equal nor rational but which will meet the practical needs of the parties and provide peace. . . . For the law to impose substantial limits by inquiring closely into the fairness of the compromises would hinder the parties in arriving at peaceful settlements."[22]

Professor Summers and others holding similar views would be the first to insist, of course, that a peaceful settlement, however desirable as an objective, cannot be regarded as the sole, or perhaps even the decisive, criterion in determining the amount of leeway the union should be allowed in negotiating a collective agreement. For example, the agreement between the Louisville & Nashville Railroad and the Brotherhood of Locomotive Firemen and Enginemen, pursuant to which Negro firemen were placed at the bottom of the seniority list, may have promoted harmony between the contracting parties, but it also constituted so egregious a violation of minority rights that it could not be permitted to stand.

In the *Steele* case the United States Supreme Court emphasized the duty of the statutory bargaining representative "to represent non-union or minority union members . . . without hostile discrimination, fairly, impartially, and in good faith." That duty, the Court said, included an obligation "to consider requests of non-union members . . . and expressions of their views with respect to collective bargaining with the employer and to give them notice of and opportunity for hearing upon its proposed action."[23] In formulating their contract

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21 *Ibid.*

22 Summers, *supra* note 18, at 71-72.

23 Steele v. Louisville & N. R.R., *supra* note 5, at 204.

demands most unions satisfy this requirement with respect to their own members; but it is doubtful that nonunion members in the bargaining unit are often given much of an opportunity to be heard on the merits of suggested contract proposals. This fact provides both a reason why every employee in the bargaining unit should, in his own self-interest, join the union representing him, and an argument against allowing any union which arbitrarily and unreasonably excludes qualified employees from membership to exercise the rights of exclusive bargaining representation with respect to such employees.

When Congress adopted the LMRDA, it once again passed up the opportunity to require in specific terms the admission on an equal basis of all qualified bargaining-unit employees as a condition for certification of a union as the exclusive bargaining representative.[24] Nevertheless, there is still some room for argument that under section 101(a)(1) of the new law qualified employees who are denied admission on an equal basis are entitled to "equal rights and privileges within such organization to nominate candidates, to vote in elections and referendums . . . to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."[25] This argument is based primarily on the definition of "member," which is defined in section 3(*o*) of the act as follows:

> "Member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

It also receives some slight support from the language of section 2, setting forth the declaration of findings, purposes, and policy of the act, which speaks only of "employees" and not of union members.[26] Despite these faint glimmers of hope, however, the chances of qualified employees who are unfairly denied union membership securing the right to share equally in the normal rights and benefits of membership must still be considered as remote.

The case of the employee who, though eligible for union mem-

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[24] See Aaron, "The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. 851, 860-61 (1960).

[25] *Id.* at 862.

[26] See Givens, "The Enfranchisement of Employees Arbitrarily Rejected for Union Membership," 11 Lab. L.J. 809 (1960).

bership, refuses to join is of an entirely different order. The problem here is *his* problem, not the union's, and whether or not he is compelled by a union-shop agreement to support the union is really irrelevant. If his views on important collective bargaining policies are not considered simply because he will not attend union meetings, he is hardly in a position to complain. His quarrel is really with the national labor policy, which makes the union selected by the majority of workers in the bargaining unit his exclusive representative, whether he likes it or not.

Between the two extremes of the employee whom the union wrongfully refuses to represent fairly and the employee who refuses to give the union a chance to represent him fairly, lie the mass of cases, typified by *Ford Motor Co. v. Huffman,* in which the competing equities are more closely in balance. Let us suppose a case in which an employer has unilaterally established and maintained a contributory pension plan for his employees, who are unorganized. Under this plan eligible employees have received pension benefits upon reaching the retirement age of sixty-five. Many former employees have retired under this plan; a substantial number of present employees will soon be eligible to do so.

Now let us assume that a union enters the picture and is certified as the exclusive bargaining representative. Thereafter, it negotiates a collective agreement with the employer which provides, among other things, for the abandonment of the pension plan in exchange for a health and welfare plan financed wholly by the employer. Let us assume further that this action was initiated by the union after a general discussion of bargaining demands by a representative group of bargaining-unit members; that it represented the wishes of most of the younger workers, who constituted a slight majority; and that it was bitterly opposed by most of the older workers, who constituted a substantial minority. Under these circumstances has the union fulfilled or violated its duty of fair representation?

It is clear that the employer's acquiescence in the new arrangement has no bearing on the union's obligation to the employees it represents. We may also disregard the possible effects of the new collective agreement on the rights of retired employees. Since those employees are no longer members of the bargaining unit represented by the union, it is unlikely that their rights are subject to modification by the joint or individual actions of the union or the employer.[27] In any event, the problem of retired employees is a peculiar aspect of our

[27] Note, "Contractual Aspects of Pension Plan Modification," 56 Colum. L. Rev. 251, 268 (1956).

hypothetical fact situation and is not usually present in cases of the general type under consideration.

At first blush, then, it would appear that our hypothetical problem falls comfortably within the rule of the *Huffman* case. Certainly, in some respects pension provisions in collective agreements are quite similar to seniority provisions: the life of any negotiated agreement may be a short one, and the initial promise of benefits provided thereunder may never be fulfilled. Even though a pension plan or a seniority system continues in effect, the parties may agree, from time to time, on changes that reduce or alter the benefits that were previously provided to some or all of the employees in the bargaining unit. In *Huffman* the Supreme Court wisely recognized that possibility as a fact of industrial life, and refused to set aside the new seniority agreement negotiated by the union in the absence of a showing that the union had acted in bad faith.

Yet even in seniority cases there are definite limitations on the union's authority to modify the rights of individual employees under *existing* provisions. Although seniority is not a property right that exists independently of the collective agreement, seniority benefits provided by the agreement have been denominated valuable property rights which will be enforced.[28] As one writer has observed:

> The fundamental distinction seems to be this: The union which has authority to change the entire seniority structure has no authority to act for an employee in waiving his rights to the benefit of an existing bargain. . . . [However,] if the union determines, as a legislature might, that the interests of the bargaining unit, considered as a whole, would be better served by a different seniority arrangement, there is no impairment of the obligations of any contract and no "vested rights" have been infringed.[29]

The underlying problem posed by our hypothetical case, therefore, is to determine the true nature of the union's action. Absent any vesting provisions in the employer's unilateral pension plan, the agreement to substitute the health and welfare plan would not appear to abrogate "valuable property rights" of individual employees who had not yet retired on pension. Suppose, however, that the employer had no policy of compulsory retirement, and that some employees over the age of sixty-five and with twenty-five or more years of credited service were still working in the plant. It seems altogether likely that their individual rights to the promised pension would receive judicial pro-

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[28] Clark v. Hein-Werner Corp., 8 Wis. 2d 264, 99 N.W.2d 132 (1959).

[29] Baker, Employee Rights Under Collectively Bargained Group Plans 8 (unpublished article in possession of this writer).

tection.[30] The case of employees who had twenty-five or more years of credited service but who had not yet reached age sixty-five, though not quite as strong, would also be likely to get a sympathetic hearing.

It is doubtful whether, in this type of situation, the rights of the adversely affected older employees should be determined solely on the basis of the promises initially made by the employer in his unilateral pension plan. Professor Blumrosen's argument that "the requirements implicit in our concepts of ordered liberty are now binding on union-management joint action, even though, had management acted unilaterally, it would have been free to ignore the individual employee interest,"[31] may well be applicable here. Thus, even though the employer had expressly reserved the right "to change, amend or discontinue the plan should future conditions in the judgment of the Company warrant such action," and could have done so unilaterally,[32] he might well be prohibited from accomplishing the same result by agreement with the union, perhaps on the ground that the entire agreement is subject to the union's duty of fair representation.

The one reasonably definite conclusion that emerges from all this hazy speculation is that the legality of the action taken by the employer and the union in our hypothetical case should not depend solely on whether the union acted in good faith, any more than it should depend solely upon whether the agreement fosters industrial peace. Rather, it should rest upon a determination of the nature of the pension rights being abrogated. It would seem clear that if these rights have already vested, they cannot be taken away or reduced. If they are not vested rights, but only anticipated benefits, we must consider whether they are entitled to protection against the adverse interest of the majority.

It may be that in this kind of situation the union and the employer should jointly be held accountable to the standards imposed, in some jurisdictions, on governmental agencies. In holding invalid an attempt by the City of Long Beach to amend its pension plan for firemen and policemen, thereby reducing benefits, the California Supreme Court declared that "vested contractual pension rights may be modified prior to retirement" in order to maintain the integrity and flexibility of the pension system, provided that such modifications are "reasonable." It then elaborated:

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[30] See Vallejo v. American Railroad Co. of Porto Rico, 188 F.2d 513 (1st Cir. 1951).

[31] Blumrosen, "Group Interests in Labor Law," 13 Rutgers L. Rev. 432, 483 (1959).

[32] Hughes v. Encyclopaedia Britannica, Inc., 1 Ill. App. 2d 514, 117 N.E.2d 880 (1954).

> To be sustained as reasonable, alterations of employees' pension rights must bear some material relation to the theory of a pension system and its successful operation, and changes in a pension plan which result in disadvantage to employees should be accompanied by comparable new advantages.[33]

There are obvious difficulties, however, in applying the suggested analogy to the type of problem here considered. The relationship between a union and its members is quite different from that between a governmental agency and its employees. Though unions have sometimes been likened to public utilities, they still have considerable discretion in the formulation and administration of their own policies. Given the complexity of union organization and the high incidence of conflicting interests among union members, the above-quoted test enunciated by the California Supreme Court seems too rigid to be applied to unions. Perhaps at this stage we are not ready to devise a general standard, and it may be best to rely upon the *ad hoc* judgments of the courts, based on the equities of the individual case.

B. Administering the Agreement

It is generally agreed that, with respect to the rights of their individual members, unions have a much more limited area of discretion in administering an existing collective agreement than in negotiating a new one; the question is, how much discretion do they have, assuming always that it is exercised in good faith?

As in the case of negotiating the agreement, there are very clear instances of justified and unjustified conduct that we need only identify in passing. In the first category are those cases in which the responsible union officers, having carefully and fully investigated the facts of a grievance, conclude in good faith that the grievant is in the wrong and decline to process the matter further.[34] At this point the union's duty of fair representation has been satisfied; whether the employee involved should then have recourse to individual action is another question and not within the scope of this article.[35] In the second category are those instances of patent discrimination, often covert, against nonmembers in the bargaining unit, of which several examples have previously been cited. The great majority of cases again fall midway

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[33] Allen v. City of Long Beach, 45 Cal. 2d 128, 131, 287 P.2d 765, 767 (1955).

[34] Ostrofsky v. United Steelworkers, 273 F.2d 614 (4th Cir. 1960).

[35] Differing views on this subject are expressed in A.B.A. Report on Individual Grievances, reprinted in 50 Nw. U.L. Rev. 143 (1955); Blumrosen, "Legal Protection for Critical Job Interests: Union-Management Authority Versus Employee Autonomy," 13 Rutgers L. Rev. 631, 653-57 (1959); Cox, "Individual Enforcement of Collective Bargaining Agreements," 8 Lab. L.J. 850, 858-59 (1957).

between these extremes. From the wealth of examples we shall select only two for discussion.

In *Clark v. Hein-Werner Corp.*,[36] a dispute arose over the meaning of a seniority clause in an existing collective agreement. The company demoted and transferred back to the bargaining unit a number of supervisors who had originally been promoted out of the bargaining unit. The question was whether these employees had accumulated bargaining-unit seniority during their period of service as supervisors. The company took the position that they had; consequently, it permitted the demoted supervisors to "bump" less senior employees in the bargaining unit, with the result that four of the latter group were laid off. The union, claiming that the former supervisors had not accumulated seniority during their period of service outside the bargaining unit, appealed the grievance of the employees who had been laid off to arbitration.

The arbitration proceeding was conducted in accordance with the procedure prescribed in the collective agreement. Both parties were represented by counsel. The arbitrator received evidence and heard witnesses; counsel submitted oral arguments and post-hearing briefs. There was just one hitch: none of the demoted supervisors was notified of the time and place of the hearing and none was present or participated in the proceeding. Thereafter, the arbitrator ruled in the union's favor on all counts. He held that under the agreement employees could not accumulate seniority while working outside the bargaining unit, and he ordered the reinstatement with back pay of the employees who had been laid off. After the company had complied with the award, seventeen of the twenty-nine former supervisors adversely affected thereby filed a suit in the state court to have the award nullified and to restrain the company and union from applying it to the plaintiffs. Judgment for the plaintiffs was affirmed on appeal to the Wisconsin Supreme Court, principally on the ground that the plaintiffs had been denied notice of the hearing and the opportunity to be heard. Conceding that the plaintiffs' views were the same as those presented by the employer to the arbitrator, the court said: "Employees not fairly represented by the union should never be put in the position of having to solely depend upon the employer's championing their rights under the collective-bargaining contract."[37] As the court viewed the situation:

> where the interests of two groups of employees are diametrically opposed to each other and the union espouses the cause of one in the arbitration, it follows *as a matter of law* that there has been no

[36] 8 Wis. 2d 264, 99 N.W.2d 132 (1959), *rehearing denied,* 100 N.W.2d 317 (1960).
[37] 8 Wis. 2d 264, at 275, 99 N.W.2d 132, at 138.

> fair representation of the other group. This is true even though, in choosing the cause . . . to espouse, the union acts completely objectively and with the best of motives. The old adage, that one cannot serve two masters, is particularly applicable to such a situation.[38]

The decision in the *Hein-Werner* case is subject to criticism on a variety of grounds. There was ample evidence in the record that the plaintiffs had full knowledge that the arbitration would take place, even though they received no formal notice as to time and place, and there was no indication that they sought to intervene. Indeed, the sole basis for the suit, resolutely ignored by both the trial and the appellate courts, was that the arbitrator had exceeded his authority. Moreover, it appears that the plaintiffs' seniority claims were ably presented by counsel for the employer, who took the same position. The Wisconsin Supreme Court's generalization, that employees not fairly represented by the union ought never to have to rely solely upon the employer to protect their rights under the collective agreement, lacks persuasiveness when applied to the facts of this case. The most interesting, as well as the most controversial, aspect of the decision, however, is the court's statement, quoted above, that the union had failed, "as a matter of law," fairly to represent the demoted supervisors because it argued against their position in the arbitration. The effect of this dictum is to neutralize the union on every question of contract interpretation concerning which the opinion of its membership is not unanimous—that is to say, on almost every issue. One would be hard put to find a better recipe for undermining union responsibility and promoting general anarchy within the plant community.

The court fell into error by treating the union's right to exercise its institutional judgment as nothing but the obverse of the individual employee's right to due process, whereas the two are separate, though related, concepts. In deciding in good faith, after full consideration of the competing equities, to argue that the seniority provision in the agreement did not permit employees to accumulate seniority while working outside the bargaining unit, the union did not violate its duty of fair representation toward those employees who urged the opposite interpretation. On the other hand, there is considerable merit to the contention that those employees adversely affected by the union's position were entitled to notice of and separate representation at the arbitration hearing. In the *Hein-Werner* case it appears that the plaintiffs did have notice of the hearing and that their own views were presented adequately; but even if we assume the contrary, it is incor-

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38 8 Wis. 2d 264, at 272, 99 N.W.2d 132, at 137. Emphasis added.

rect to conclude that the union was under a duty to present their side of the dispute.

Although the decision in the *Hein-Werner* case is wrong, it calls attention to an important truth that is frequently overlooked, namely, that some individual rights worthy of protection cannot adequately be preserved simply by invoking the concept of the union's duty of fair representation. Fair representation does not imply strict neutrality; the union has the right and the duty to take a position on disputed issues involving the administration of the collective agreement. If that position, which represents a good-faith judgment on the union's part, adversely affects what Professor Blumrosen has called the "critical job interests"[39] of some bargaining-unit employees, they may be entitled to separate representation in presenting a grievance to the employer or to an arbitrator. The task of determining which job interests are "critical" is not an easy one; perhaps, like the problem discussed in the previous section of this article, it must be dealt with on an *ad hoc* basis. The point to be emphasized is that this right, to the extent that it exists, is something different from and in addition to the right of fair representation by the union.

By way of contrast, let us now consider a case in which the protection of employees' critical job interests was complicated by the rather obvious failure of the union to observe its duty of fair representation. In *Soto v. Lenscraft Optical Corp.*, the employer had a collective bargaining agreement with a local of the Jewelry Workers Union. Some of the employees in the bargaining unit became dissatisfied with the union's administration of the agreement and apparently encouraged a local of the Teamsters Union in its efforts to supplant the Jewelry Workers as the bargaining representative of the unit. At one point the Teamsters called a strike and picketed the Lenscraft plant. In a successful suit to enjoin the picketing the employer was represented by the attorney for the Jewelry Workers. Following the injunction, Lenscraft discharged seven of its employees for allegedly engaging in a slowdown. They filed a grievance, which the union (Jewelry Workers) carried to arbitration.

About two hours before the arbitration hearing was scheduled to begin, the employer delivered letters to the grievants, informing them of the time and place of the hearing, ostensibly in order that they might appear and be heard. The grievants showed up with their own attorney, who was also attorney for the Teamsters local that had tried to take over the Lenscraft unit. Counsel for the Jewelry Workers, who was presenting the union's case on behalf of the grievants, was the same attorney who had obtained the injunction for the employer

[39] Blumrosen, *supra* note 35.

against the Teamsters. The grievants' attorney asked for and obtained a continuance, and the arbitrator took under advisement his request to represent the grievants in the arbitration, on the ground that the Jewelry Workers' attorney was obviously biased against his clients. Before resuming the hearing, the arbitrator denied the request, and the grievants voluntarily elected not to appear. Counsel for the Jewelry Workers interposed no defense on behalf of the grievants, and their discharges were upheld by the arbitrator.

The grievants then brought suit to vacate the arbitrator's award. A decision in their favor[40] was affirmed by the appellate division of the New York Supreme Court,[41] which held that "enough was shown to negative the possibility of fair representation of the interests of petitioners by Local 122"[42] of the Jewelry Workers, and that the grievants should therefore have been permitted to be represented by their own counsel. On appeal, the decision was reversed,[43] on the dubious ground that the grievants were not legal parties to the arbitration and had no standing to challenge the award.

In terms of the role played by the exclusive bargaining representative, the differences between the *Hein-Werner* and the *Lenscraft* cases are at once apparent. In the former case the union openly took sides in the controversy between two groups of its members and elected to support one group against the other; in the latter case the union purported to represent the interests of its seven aggrieved members when in fact it was acting in collusion with the employer to secure their discharge. From the reported facts of the *Lenscraft* case one gets the strong impression that the grievants were openly promoting dual unionism, which is universally regarded as treason in the union movement. The Jewelry Workers might well have been justified, therefore, in refusing to process the grievance, leaving the grievants to pursue such other legal or equitable remedies as were available. As previously suggested, whatever relief they might thus have obtained could not properly have been predicated on the union's failure to represent them fairly, but only on the theory that they could not be discharged without an opportunity to present evidence and argument in their own behalf to a neutral third party. Instead of refusing to process the grievance, however, the union pretended to represent the grievants, with the result that the arbitration case was not fairly presented on the merits. This, clearly, was a violation of the union's duty of fair representation.

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40 Soto v. Lenscraft Optical Corp., 137 N.Y.L.J. 6 (Apr. 12, 1957).

41 7 App. Div. 2d 1, 180 N.Y.S.2d 388.

42 7 App. Div. 2d 1 at 6, 180 N.Y.S.2d 388, at 393.

43 Matter of Soto, 7 N.Y.2d 397, 165 N.E.2d 855 (1960).

The *Hein-Werner* and *Lenscraft* decisions are especially regrettable, not only because, in this writer's opinion, they were wrongly decided and have created harmful precedents, but also because the same results might have been obtained under proper procedures. Had the Hein-Werner supervisors been permitted to appear in the arbitration hearing and to supplement the employer's case with arguments in their own behalf, there would have been no denial of due process and the arbitrator's decision would almost certainly have been the same. Similarly, in the *Lenscraft* case, if the union had participated in the arbitration only as an observer and if the grievants had been treated as the real parties to the dispute with the employer, there is a good chance that the discharges would still have been sustained.

C. The Use of Compulsory Union Dues and Initiation Fees for Political Purposes

We come finally to the third, and in many ways the most interesting, type of situation discussed in this article. As mentioned earlier, the NLRA, as amended, authorizes a limited form of union security, under which all members of the bargaining unit must contribute to the support of the union by tendering a uniform initiation fee and periodic dues payments. The act also provides, however, that nothing therein "shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by . . . law."[44]

Unlike the NLRA, the Railway Labor Act contains no provision exalting state or territorial law over the federal statute in respect to union security; on the contrary, section 2, eleventh, expressly permits execution of the prescribed form of union-security agreement "notwithstanding . . . any other statute or law of the United States, or Territory thereof, or of any State." The constitutionality of this section was unanimously upheld by the United States Supreme Court in *Railway Employes' Dep't v. Hanson*,[45] which involved a conflict between that section and the "right-to-work" provision of the Nebraska constitution.

In discussing the issues raised in the *Hanson* case Mr. Justice Douglas, speaking for the Court, acknowledged that "to require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course." He added, however, that Congress had attempted no more than to "help insure the right to work

[44] Section 14(b), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

[45] 351 U.S. 225 (1956).

in and along the arteries of interstate commerce."[46] Noting that the only conditions to union membership authorized by this section are the payment of periodic dues, initiation fees, and assessments, he observed that the financial support required "relates . . . to the work of the union in the realm of collective bargaining," and that "no more precise allocation of union overhead to individual members seems to us to be necessary."[47]

The Justice then turned to the argument that "the union shop agreement forces men into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought protected by the Bill of Rights."[48] Although he found no evidence in the record of any substantial impairment or infringement of first amendment rights, Mr. Justice Douglas added: ". . . if the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case."[49] Thus, the Court specifically reserved for future decision the problem which we shall now consider.

In 1953 the Georgia Southern & Florida Railway entered into union-shop agreements of the type permitted by the amended Railway Labor Act with the International Association of Machinists and various other unions. Subsequently, a group of employees who objected to joining the union brought an action against Georgia Southern and eight other railroads and terminal companies, the Machinists and thirteen other labor organizations, and a large number of individual defendants to enjoin enforcement of the union-shop agreements and to have them declared null and void. The petitioners alleged, among other things, that the initiation fees, periodic dues, and assessments which they would be required to pay under the union-shop provision would be used "in substantial part for purposes not germane to collective bargaining but to support ideological and political doctrines and candidates" to whom they were opposed. After granting a temporary injunction, the trial court subsequently dissolved the injunction and sustained the motion filed on behalf of the defendant unions to dismiss the action against all defendants. The petitioners then appealed to the Georgia Supreme Court, which reversed the decision of the court below.[50] The appellate tribunal's unanimous opinion stated in part: "We do not believe one can constitutionally be compelled to

[46] *Id.* at 235.

[47] *Ibid.*

[48] *Id.* at 236.

[49] *Id.* at 238.

[50] Looper v. Georgia Southern & Florida Ry., 213 Ga. 279, 99 S.E.2d 101 (1957).

contribute money to support ideas, politics and candidates which he opposes. We believe his right to immunity from such exactions is superior to any claim the union can make upon him."[51]

The case was remanded to the superior court of Bibb County, Georgia, where it was tried without a jury on a stipulated set of facts, on the basis of which the trial court found and concluded in part:

> (5) The funds so exacted from plaintiffs and the class they represent by the labor union defendants have been, and are being, used in substantial amounts by the latter to support the political campaigns of candidates for the offices of President and Vice President of the United States, and for the Senate and House of Representatives of the United States, opposed by plaintiffs and the class they represent, and also to support by direct and indirect financial contributions and expenditures the political campaigns of candidates for State and local public offices, opposed by plaintiffs and the class they represent. . . .
>
> (6) Those funds have been and are being used in substantial amounts to propagate political and economic doctrines, concepts and ideologies and to promote legislative programs opposed by plaintiffs and the class they represent . . . [and] also . . . to impose upon plaintiffs and the class they represent, as well as upon the general public, conformity to those doctrines, concepts, ideologies and programs.
>
> (7) The exaction of moneys from plaintiffs and the class they represent for the purposes and activities described above is not reasonably necessary to collective bargaining or to maintaining the existence and position of said union defendants as effective bargaining agents or to inform the employees whom said defendants represent of developments of mutual interest . . . .
>
> (10) The labor union defendants, by their commingling of funds used for collective bargaining purposes and activities and those used for the complained of purposes and activities set forth above have made it impossible to segregate the amount of dues collected from plaintiffs and the class they represent which are and will be used for collective bargaining purposes from those which are and will be used for the complained of purposes and activities set forth above.[52]

On the basis of these and other findings and conclusions, the trial court declared section 2, eleventh, of the Railway Labor Act unconstitutional, "to the extent that it . . . is applied to permit the exaction of funds from plaintiffs and the class they represent for the complained of purposes and activities"; it also declared the union-shop agreements null and void, permanently enjoined their enforcement, and ordered the return of paid-in dues, initiation fees, and as-

51 213 Ga. 279, at 284-85, 99 S.E.2d 101, at 105.

52 Looper v. Georgia Southern & Florida Ry., 36 CCH Lab. Cas. 65,463, 65,466-67 (Ga. Super. Ct., Bibb Co., Nov. 21, 1958).

sessments to certain individual plaintiffs.[53] The Georgia Supreme Court affirmed,[54] and the case was then appealed to the United States Supreme Court.[55]

As of the time this article is written, the Court has not decided the *Street* case. If it follows the suggestion of the Department of Justice, it will uphold the constitutionality of this section and of union-shop agreements made thereunder, but will not rule on the propriety of the union political expenditures complained of in the suit. In its brief supporting this position the Department states:

> We submit that appellees have other remedies—either on remand, together with amendment of the complaint and prayer to enjoin use of monies paid by them for the purposes to which they object, or in a new suit—if they desire to test the validity of the expenditures they attack.[56]

Noting that appellees have never recognized any distinction between union expenditures for such varied purposes as testimony before legislative committees, donations to political campaigns, support of wage and hour legislation, and support of farm legislation, between expenditures by the appellant unions and expenditures by the AFL-CIO, or between advocacy of ideas and candidates by a newspaper supported by subscriptions and such advocacy by journals supported directly out of general dues funds, the Department argues that these several activities "involve many differing considerations, and probably should not be treated in one basket for analytical or constitutional purposes."[57] At the same time, the Department takes the position that:

> unions do have a responsibility toward dissenting members in taking "political" action, and on a proper record and a proper request for relief, either on remand in the present case or in a new action, it may be that certain of the appellants' expenditures will be found to be illegal as to the appellees and those they represent.[58]

The argument for remand or dismissal of the action in the *Street* case on the grounds urged by the Department is persuasive; but sooner

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[53] *Id.* at 65,467-68.

[54] International Ass'n of Machinists v. Street, 215 Ga. 27, 108 S.E.2d 796 (1959).

[55] The Court, having noted probable jurisdiction, 361 U.S. 807 (1959), heard argument on April 21, 1960; it later certified to the Attorney General that the constitutionality of the Railway Labor Act had been drawn in question, and set the case for reargument. 363 U.S. 825 (1960). Subsequently, the Court granted the Government's petition to intervene. 29 U.S.L. Week 3101 (Oct. 11, 1960). Reargument was heard on Jan. 17, 1961.

[56] Quoted in Bureau of Nat'l Affairs, Daily Lab. Rep. No. 231, Nov. 29, 1960, p. A-2.

[57] *Id.* at A-3; see also Daily Lab. Rep. No. 11, Jan. 17, 1961, p. A-9.

[58] Daily Lab. Rep. No. 231, Nov. 29, 1960, p. A-2.

or later the Court will have to deal with the challenge to union political expenditures of the type there involved on its merits. Accordingly, we shall discuss this aspect of the *Street* case as if it were properly before the Court for decision.

In his opinion in *Hanson,* Justice Douglas compared the alleged infringement or impairment of the "first amendment rights" of employees covered by a union-shop clause, who did not wish to join the union with "the case of a lawyer who by state law is required to be a member of an integrated bar."[59] The appellees in the *Street* case argue, however, that the integrated bar case is distinguishable on many factual and legal grounds, the principal ones being that the expenditure of integrated bar funds is supervised by the state court and that the integrated bar is a governmental, rather than a private, organization.[60]

The similarities and differences between compulsory membership in a union and compulsory membership in an integrated bar are highlighted by the decision in *Lathrop v. Donohue,*[61] involving a challenge to the constitutionality of the Wisconsin integrated bar. The complaints in both the *Lathrop* and *Street* cases are similar. Thus, in *Lathrop* the plaintiff bases his argument that compulsory dues of the state bar infringe upon first amendment freedoms on the ground that the state bar takes a stand on pending legislation, and that "part of his dues money is used to support causes to which he is opposed."[62] The cases are at least formally distinguishable, on the other hand, because all activities engaged in by the state bar in the legislative field are limited by its rules and bylaws, which are promulgated by the Wisconsin Supreme Court. According to the opinion in the *Lathrop* case, the Wisconsin court:

> has determined that it promotes the public interest to have public expression of the views of a majority of the lawyers of the state, with respect to legislation affecting the administration of justice and the practice of law . . . voiced through their own democratically chosen representatives comprising the board of governors of the State Bar [and that] the public interest so promoted far outweighs the slight inconvenience to the plaintiff resulting from his required payment of the annual dues.[63]

These revealing observations suggest that the distinctions between the *Street* and *Lathrop* cases are more apparent than real. In both, the complaint is against being compelled to contribute money

[59] Railway Employes' Dep't v. Hanson, 351 U.S. 225, 238 (1956).

[60] Brief upon Reargument for Appellees, p. 17.

[61] 10 Wis. 2d 230, 102 N.W.2d 404 (1960), *appeal filed* June 30, 1960 (No. 200), 29 U.S.L. Week 3039 (Aug. 2, 1960).

[62] 10 Wis. 2d 230, at —, 102 N.W.2d at 409.

[63] 10 Wis. 2d 230, at —, 102 N.W.2d at 404, 411.

that will be used to support causes opposed by the contributor; and it is this element of compulsion that is the real common denominator. Surely, a distinction between the two cases cannot be predicated on the unproved assumption that integrated bar funds are spent more wisely or for worthier purposes than are union funds, or that opposition to such expenditures is reasonable in the *Street* case but unreasonable in the *Lathrop* case. On the contrary, the element of economic compulsion and, for all we know, the sense of moral outrage in those subject to it are the same in both cases; and what the Georgia court denounces as an unconstitutional invasion of individual rights is dismissed by the Wisconsin court as a "slight inconvenience."

The integrated bar case thus provides an apt statutory analogy to the problem raised in the *Street* case. For an analogy from the common law we can turn to the celebrated litigation between the late Cecil B. De Mille and the American Federation of Radio Artists (AFRA).[64]

De Mille was expelled by AFRA for refusing to pay a compulsory assessment of one dollar per member levied in conformity with the union's constitution and bylaws, for the purpose of fighting a proposed "open-shop" amendment (Proposition No. 12) to the California constitution. Like the appellees in the *Street* case, DeMille opposed the purpose for which this money was spent, and argued that the levy infringed his constitutional rights of suffrage, freedom of speech, and assembly. It will be useful, therefore, to review the unanimous decision of the California Supreme Court, sustaining the dismissal of his action, and to determine which of its conclusions, if any, are equally applicable in the *Street* case.

In *De Mille,* the court found that AFRA was pursuing a legal objective in seeking to defeat the "open-shop" amendment. From this it followed that, "acting in conformity with the will of the majority of its members," AFRA had a right "to devote its funds to any purpose calculated to promote the objects of the association."[65] The same reasoning would seem to apply in the *Street* case. The union expenditures complained of by the appellees are not illegal, and one may reasonably infer that the money has been spent with the approval of a majority of the contributing employees. On these points, therefore, the two cases are indistinguishable.

De Mille was covered by a union-shop agreement and was compelled by its terms to join the Los Angeles local of AFRA in order to continue producing a radio program over the Columbia network.

[64] De Mille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 187 P.2d 769 (1947), *cert. denied,* 333 U.S. 876 (1947).

[65] 31 Cal. 2d 139, at 146, 187 P.2d 769, at 774.

AFRA's constitution provided that initiation fees, dues, and assessments were to be fixed by the local unions for all of their members. What was required by the union's constitution in the *De Mille* case was permitted in all material respects by the Railway Labor Act in the *Street* case; the court found no violation of the union's constitutional rules or procedures in the one, and, similarly, there has been no proven breach of either the statutory requirements or the union's rules in the other.

De Mille did not contend that he was prevented from voting as he pleased at the polls or from expressing publicly or privately his support of the "open-shop" amendment. Nevertheless, he argued that:

> to compel appellant to put his hand in his pocket and to give money to AFRA leaders to be used to oppose Proposition No. 12 . . . when he was unwilling to oppose it . . . compelled appellant to give expression to sentiments and to act contrary to his sentiments and to his thoughts, and . . . to his opinion. . . . The giving of money . . . was more eloquent than the use of actual words.[66]

The complaint is the same in *Street*, and like the appellees in that case,[67] De Mille also sought to draw an analogy between his predicament and that of the plaintiffs in the flag salute cases,[68] in which it was ultimately held that the required ritual constituted a compulsory personal expression contrary to the plaintiffs' religious tenets.

The California court thought the analogy was inapposite, however, because it was based on two erroneous assumptions: first, that De Mille's compulsory contribution to the union fund would be a personal endorsement by him of opposition to Proposition No. 12; and second, that the employment by AFRA of the assessment fund to defeat the proposed amendment would be a use of his money for that purpose. These assumptions, said the court, ignored the basic distinction between the union member and his organization. The latter, both structurally and functionally, "is an institution which involves more than the private or personal interests of its members." The assessments contributed by the members became the property of AFRA, "and any several or individual interest therein cease[d] upon such payment."[69]

This analysis is equally applicable to the facts of the *Street* case. The crucial test, it would seem, is whether the union has the legal right to expend its own funds for the purposes in question; if it does, the

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[66] 31 Cal. 2d 139, at 148, 187 P.2d 769, at 775.

[67] Brief upon Reargument for Appellees, pp. 36, 41.

[68] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), overruling Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940).

[69] De Mille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, 149, 187 P.2d 769, 776 (1947).

fact that some or all of those funds are made up of individual contributions of union members is irrelevant.

It will be recalled that the Government's brief in the *Street* case suggested the possibility that, on a proper record, "certain of the appellants' [unions'] expenditures will be found to be illegal as to the appellees and those they represent."[70] Conceivably, the Solicitor General had in mind the possible violation of section 501 of the Labor-Management Reporting and Disclosure Act of 1959, which reads in part:

> (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, ... A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

A review of the legislative history of the LMRDA justifies the prediction that the unions' political expenditures complained of in the *Street* case are not likely to be held to violate section 501. In the first place, specific proposals to outlaw exactly those types of levies and expenditures, though included in both the Barden and the McClellan bills submitted to the Eighty-Sixth Congress,[71] were omitted from the statute as enacted. The lack of a similar provision in the bill passed by the Senate was specifically cited in the minority report filed by Senators Goldwater and Dirksen,[72] and during the Senate debate Senator Goldwater reviewed in considerable detail the background facts of the *Street* case.[73] In the House debates the same criticisms were voiced by Representative Hoffman,[74] while Representative Griffin, characterizing his own bill as a "minimum bill," pointed out that "there is nothing [in it] dealing directly with the use of union dues for political activities."[75]

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[70] See *supra* note 28.

[71] H.R. 4473, 86th Cong., 1st Sess. § 204 (1959) (Barden); S. 1137, 86th Cong., 1st Sess. § 412 (1959) (McClellan).

[72] S. Rep. No. 187, 86th Cong., 1st Sess. 85-87 (1959).

[73] 105 Cong. Rec. 9119-21 (daily ed. June 8, 1959); see also *id.* at 12154-56 (daily ed. July 14, 1959).

[74] *Id.* at 14190-91 (daily ed. Aug. 11, 1959).

[75] *Id.* at 14199 (daily ed. Aug. 11, 1959).

In the second place, it will be difficult, if not impossible, to prove that the expenditures of union funds in *Street* were not "solely for the benefit" of the organization and their members. By enacting the LMRDA Congress demonstrated beyond dispute that the most vital interests of unions and their members are not limited to the context of collective bargaining, but extend into the political arena. The welfare of organized labor is affected, not only by so-called "labor legislation," but also by executive, legislative, and judicial decisions with respect to monetary and fiscal policy, defense, education, health, and many other issues. Finally, policies are made by men, and it is sheer sophistry to argue that although a union may legitimately support certain legislative objectives, it may not spend its funds to secure the election of candidates whom it hopes or has reason to believe will work to achieve labor's goals.

In dealing with the problem presented by the *Street* case, it is not enough, however, to show simply that the unions' actions giving rise to the suit do not invade constitutional rights or violate the statutory or common law; the question whether they do violence to our conception of the union's duty of fair representation remains. It is not difficult to think of cases in which a union's political expenditures may be intended to serve the personal interests of a few people, rather than to promote the welfare of union members or of labor generally; yet the number of such instances is probably not very great. Most union constitutions and bylaws insure that members who are sufficiently interested to attend meetings and vote will have an active voice in determining how the organization's money should be spent, and title I of the LMRDA guarantees that right.

The furor over the *Street* case should not be permitted to obscure the fact that the right of individual dissent has not been impaired. There is no evidence that the "exaction of dues, initiation fees, or assessments is [being] used as a cover for forcing ideological conformity."[76] The appellees in that case are free to spend their time and money in open support of causes and candidates opposed by their unions. So long as that recourse remains open to them, we need not be seriously concerned about the possible loss of individual freedom.

It would seem, therefore, that so long as the union observes its own constitution and bylaws, carries out its normal collective bargaining obligations, and does not seek to prevent its members from exercising their rights as citizens, it violates no duty of fair representation

[76] Railway Employees' Dep't v. Hanson, *supra* note 59, at 238. A more serious problem in this regard is raised by the decision in Mitchell v. International Ass'n of Machinists, 39 CCH Lab. Cas. 69,715 (Cal. Super. Ct., Mar. 9, 1960), which upheld the expulsion, for "disloyalty," of union members advocating right-to-work legislation.

by advocating political measures and supporting candidates for office against the wishes of some of its members. To return to our original thesis, the union's duty of fair representation arises out of the collective bargaining relationship; and provided that it faithfully carries out its obligations in that sphere, it should be permitted to pursue in good faith, and in accordance with its own rules and the existing law, its institutional objectives in the broader areas of local and national politics, regardless of whether those objectives are opposed by some of its members.

III. Conclusion

The first two problems we have considered are among the most perplexing in the field of labor law. This is so because they involve a direct and often irreconcilable conflict between the union's institutional objectives and the rights and interests of its individual members. The key to their solution is not to be found in absolute principles, nor do they fit easily into the framework of generalization. The examples we have discussed under the headings of negotiating and administering collective agreements suggest that decisions are more likely to turn upon the facts of a given case than upon the application of an established rule of law.

The third problem—expenditure of compulsory union dues and initiation fees for political purposes—is perhaps of greater concern to the general public than the other two; yet in its present context it seems, at least to this writer, to raise the least difficult questions. Its apparent complexity results from the tendency to look at it, so to speak, through a faulty lens, which magnifies the aspect of a compulsory tax for an undesired purpose, but obscures the aspect of freedom to dissent and to work for the opposing cause. Yet the problem seldom involves an infringement of established individual rights, either those guaranteed by the Constitution or by statutory law or those created by a private collective agreement. Stripped of all its disguises, the *Street* case thus emerges as simply another attack on the validity of the union shop; and the issues it raises are neither novel nor particularly significant.